UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

SUPERSHUTTLE INTERNATIONAL DENVER, INC.,[1]

Employer,

and Case No. 27-RC-8582

COMMUNICATIONS WORKERS OF AMERICA,

Petitioner.

REGIONAL DIRECTOR'S DECISION AND ORDER

On December 11, 2009, Communications Workers of America (CWA or Union), filed a petition seeking to represent the shuttle van drivers employed by SuperShuttle International Denver, Inc., (SuperShuttle Denver or Employer) in its Denver, Colorado metropolitan area operations.

The Employer contends that this representation petition should be dismissed on the basis that the shuttle van drivers whom it calls "unit franchisees," are independent contractors, not employees within the meaning of Section 2(3) of the Act. The Employer also argued for the first time in its post-hearing brief that the unit franchisees are statutory supervisors under Section 2(13) of the Act because they have the ability to hire relief drivers under their franchise agreements. Finally, the Employer contends

[1] The legal name appears as it was identified throughout the record..

that the petition must be dismissed on the basis that CWA is disqualified from representing the unit franchisees because a disabling conflict of interest exists by virtue of CWA's relationship with Union Taxi Cooperative.

As discussed fully below, I find that the Employer has failed to meet its burden of establishing that the shuttle van drivers are independent contractors based on the analytical framework enunciated by the Board in *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998). I also conclude that the record before me is insufficient to make a determination regarding the supervisory status of the unit franchisees since the Employer did not raise, and the parties did not litigate, the supervisory issue at the hearing. See e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

I do, however, find merit to the Employer's contention that the petition must be dismissed because of the Union's unique relationship with Union Taxi Cooperative. Specifically, I find that relationship constitutes a disabling conflict of interest because it conflicts with the requirement of the Act that a collective-bargaining agent must have a "single-minded purpose of protecting and advancing the interests of unit employees." See, e.g., *St. John's Hospital and Health Center*, 264 NLRB 990 (1982), and the cases cited therein.

STATEMENT OF THE CASE

A hearing was held on December 28, 2009, and January 7, 8, and 12, 2010, in Denver, Colorado, before Todd Saveland, a hearing officer for the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has

delegated its authority in this proceeding to me. Petitioner seeks to represent the following bargaining unit:

> **INCLUDED: All full-time and part-time shuttle van drivers employed by the Employer in its Denver, Colorado operations.[2]**
>
> **EXCLUDED: All other employees, confidential employees, professional employees, managers, guards, and supervisors as defined by the Act.**

Upon the entire record in this proceeding, I make the following findings:

1. **Hearing and Procedures**: The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction**: The Employer, SuperShuttle International Denver, Inc., a wholly owned subsidiary of SuperShuttle International, Inc., maintains an office and principal place of business in Denver, Colorado, and is engaged in the passenger transportation industry. The Employer annually, in the course and conduct of its business operations, purchases and receives goods and materials valued in excess of $50,000 at its Denver, Colorado facility from points located directly outside the State of Colorado. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. **Claim of Representation**: The labor organization involved, Communications Workers of America, is a labor organization within the meaning of the Act.

[2] There is no evidence that SuperShuttle Denver has any "part-time" drivers. Rather, the record establishes that approximately 14 "relief" drivers have been screened and approved to drive vans if the unit franchisees elect to take time off. Since the record is devoid of evidence regarding the frequency with which any of the relief drivers are utilized by the unit franchisees, these relief drivers may, at best constitute casual drivers. I am declining to make any findings on this issue on the basis of my decision to dismiss the petition on other grounds.

4. **Statutory Question**: Based upon the record, no question affecting commerce exists concerning the representation of the laborers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

EMPLOYER'S TRANSPORTATION OPERATIONS

A. Background

Historically, SuperShuttle International, Inc., directly hired shuttle van drivers in various cities and airport markets throughout the United States. In approximately 1998, SuperShuttle International began transitioning from a direct hire business model to a franchise business model. The transition began on the East Coast and moved westward. The transition was completed by 2002. The record establishes that this transition process included elimination of shuttle van driver bargaining units through effects bargaining in New York, Washington DC, Baltimore, Los Angeles, Phoenix, and Austin, Texas.[3] There is no evidence, however, that the Board, either at the time of the transition, or subsequently, has been called upon to make any findings related to whether the shuttle van drivers constitute independent contractors under the new franchise business model.

Under the franchise business model, SuperShuttle International is the owner and holding company of the registered trademarks and proprietary systems used within the entire SuperShuttle system. SuperShuttle Franchise Corporation is a subsidiary of SuperShuttle International, as is SuperShuttle Denver.[4] Companies such as SuperShuttle Denver (referred to as "city licensees"), enter into a license agreement

[3] The record establishes that the Austin, Texas bargaining unit had actually been represented by CWA, which still represents dispatchers and curb agents in that location.
[4] SuperShuttle Denver is actually owned by Veolia Transportation on Demand, Inc., which is characterized as the largest private transportation company in North America. Veolia also operates Colorado Cab Company in Denver under the Yellow Cab label.

with SuperShuttle International and SuperShuttle Franchise Corporation for the use of the SuperShuttle trademarks in their respective territories or market areas. These territories or market areas may involve a license to serve a particular airport, or metropolitan area. SuperShuttle Denver is licensed to serve Denver International Airport from surrounding the Denver metropolitan area, including Golden, Colorado. SuperShuttle International has licensed another entity to serve the Boulder, Colorado area. The city licensees, in turn, enter into sublicense franchise agreements with shuttle van drivers to use the SuperShuttle systems and trademark, and to provide transportation services in the applicable market. These van drivers are called "unit franchisees."

B. Regulatory Scheme

The passenger transportation industry is highly regulated at the state and federal levels, as well as by local airport authorities. Thus, both SuperShuttle Denver and Union Taxi Cooperative (UTC) are subject to regulation by the Colorado Public Utility Commission, which has adopted many Federal Department of Transportation regulations, and Denver International Airport. SuperShuttle Denver is also subject to Federal Trade Commission franchise regulations.

1. FTC regulations:

SuperShuttle Franchise Corporation is the master franchisor for both the city franchisees and driver unit franchisees. All of the franchises issued by SuperShuttle Franchise Corporation are regulated by the Federal Trade Commission (FTC). SuperShuttle Franchise Corporation is also subject to state agency franchise regulations in thirteen states, excluding Colorado. FTC requires that prior to any franchise being offered to a prospective franchisee, they must be

provided a franchise disclosure document, which needs to comply with the FTC franchise law disclosure regulations, or applicable state law. Each city's franchise disclosure document is customized to specific state and city permit requirements, and airport authority requirements. The preparation of the franchise disclosure document is subject to annual review and updating to maintain compliance with changes in FTC regulations.

Under current FTC regulations, there are 23 elements that must be disclosed including: parent company information; the city licensee's business structure; date of formation of the legal entities; business experience of the officers and directors of Franchise Corporation and city licenses; any litigation involving either the parent company or city licenses; airport contracts; contact information for any current or former franchisee, any fees that a franchisee is obligated to pay under the terms and conditions of the franchise agreement; any initial startup costs such as the purchase of the franchise or acquisition of a vehicle, and any risks associated with the franchise.

2. Colorado Public Utilities Commission:

SuperShuttle Denver and UTC are both subject to regulation and oversight by the Colorado Public Utilities Commission (CPUC), and their operations are governed under CPUC Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. SuperShuttle Denver and UTC have been issued certificate numbers by CPUC, authorizing them to engage in the “Transportation of Passengers and their Baggage.” SuperShuttle Denver is authorized to operate 86 vans and UTC is authorized to operate 262 taxicabs.

SuperShuttle Denver's certificate specifically describes the boundaries and distances of SuperShuttle Denver's operational area, and the hours of service. There is also a tariff component which sets the maximum flat fares (called tariffs) SuperShuttle Denver can charge. The flat-rate fares range between $19 and $33 within the Denver metropolitan area and are set by CPUC based on zip codes. The flat-rate fares outside the Denver Metropolitan area range from $39 to $100. Unit franchisees are given a detailed fare chart with established fares for the entire area served by SuperShuttle Denver. SuperShuttle Denver occasionally issues discount coupons through direct mail or offers discounts through discount cards offered by chain stores. Drivers must honor this discounts, but are not allowed to offer their own discounts. Drivers also are not allowed to raise fares if customers are quoted inaccurate fares by SuperShuttle reservations system and have been issued "default letters" for attempting to do so.[5]

Under its current certificate, SuperShuttle Denver has been granted the authority to engage in four specific types of activities. SuperShuttle Denver is authorized to engage in door-to-door residential operations involving the transportation of passengers to and from DIA, or from their residence to other drop off locations such as hotels. SuperShuttle Denver also has the authority to pick up passengers in downtown Denver and transport them to Denver International Airport (DIA) or to other downtown locations. This is referred to as "call-on-demand, " or "point-to-point" authorization. SuperShuttle Denver's certificate also requires it to engage in scheduled pick up services at about eight specific hotels in downtown Denver. SuperShuttle Denver must file a hotel time schedule with the CPUC, and abide by

[5] The system of driver default letters is discussed *infra* at pages 14-16.

that schedule or risk losing its certification, and it must petition the CPUC to change the downtown hotel service locations, or to raise fares for any of these three types of operations. Finally, SuperShuttle Denver is authorized to engage in charter operations to areas outside the Denver metropolitan area.

UTC and other taxi companies operate under certificates which contain fare structures based on mileage, rather than flat rates. UTC is licensed to operate its 262 taxicabs in the City and County of Denver, and serve DIA.

CPUC regulations govern both SuperShuttle Denver and UTC relating to qualifications of drivers, signage requirements, requirements related to the vehicles including, size, age, maintenance, and numerous other items designed for protection of the public.[6] In this regard, CPUC has adopted by reference, and incorporated various Federal Department of Transportation (DOT) regulations related to qualifications of drivers, maximum driving times, and medical fitness examinations.

3. Denver International Airport:

The rules governing the operations of SuperShuttle Denver and UTC at Denver International Airport (DIA) are set forth in DIA Regulation Manual, Section 100 Ground Transportation Rules and Regulations. DIA requires that any vehicle operating under a license to pick up and drop off passengers must have a transponder on the vehicle which records the time the vehicle arrives at the airport and leaves the airport, as well as the time the vehicle is at the curbside actively picking up or dropping off passengers, or waiting in the holding are. The transponder is called an "automated vehicle

[6] The CPUC regulations even include a requirement that drivers be courteous to the public they serve.

identifier," and it is used by DIA to assess monthly fees based on the length of time a vehicle was on DIA property. These fees are called AVI fees. DIA bills SuperShuttle Denver for the AVI fees of its vans on a monthly basis, and SuperShuttle Denver, in turn, deducts the AVI fees from the unit franchisees' settlement checks. While the UTC taxis must also be outfitted with transponders and are assessed AVI fees by DIA, the record is silent as to whether UTC or the individual taxi operators are billed.

C. SuperShuttle Proprietary Systems

SuperShuttle International operates a nationwide reservations system and an automated dispatch system. The reservation system is comprised of two national reservation centers where there are telephone call takers. One is located in Tempe, Arizona, and the other is located in Tampa, Florida. SuperShuttle International also operates an online reservation system. This enables customers around the nation to make reservations either via talking to a live agent or booking reservations online. These reservations are automatically transmitted to the SuperShuttle dispatch system (SDS) for the specific city or market. The reservation will specify the date, time, location, and number of passengers for pick up. The SDS groups the reservations by date, and in chronological order for the time of day. Each van is equipped with a Nextel phone system which informs the van driver of available reservations.

Each van is also required to be outfitted with SuperShuttle's proprietary GPS monitoring system, which allows the city licensee to monitor the whereabouts of the shuttle vans at all times. In this regard, the dispatchers can monitor whether a van is parked in the driver's home driveway, or at a pick up or drop off location, and what route the driver is taking. The GPS tracking system also tracks the speeds at

which the vans are being driven. SuperShuttle Denver receives a weekly GPS vehicle speed report which sets forth the van number, dates, and the number of times the van was clocked traveling at speeds for each of the following ranges: 70-74.9 mph; 75-79.9 mph; 80-84.9 mph; and 85 or higher.

The unit franchisees are either assigned downtown hotel runs or door-to-door (DTD) service. The DTD van drivers are required to turn on their Nextel phone system two hours before they are scheduled to start driving, to see what reservations are available. The dispatch system automatically transmits potential trips to the Nextel phone system when it is activated. The DTD driver reviews the list of available trips, which include the pick up and drop off locations, number of passengers, number of stops, and total fares for the pick up. The driver has a 60-90 second window to bid on a trip, pass on a trip, or do nothing. If the driver bids on the trip, the SDS assigns the trip to that particular vehicle, and the vehicle proceeds to provide the service. After drivers drop off their passengers, they reactivate the Nextel phone system and the process starts over.

If a driver passes, that trip is automatically transmitted to the next driver in the vicinity of the pick up. Similarly, if the driver does not specifically bid or pass on a trip, after the time elapses, the trip passes to the next available driver. DTD drivers are automatically assigned customers by the computer system if they are available and no DTD driver bids on that run. If no DTD driver can be assigned to a customer, SuperShuttle Denver sends a Yellow Cab from its sister cab company and absorbs the cost difference.

Both downtown Denver hotel run drivers and DTD drivers can also be dispatched by the local dispatchers for "ASAP reservation" when a passenger

needs to be picked up immediately to make a flight time, or if for some reason a van is late for a scheduled pickup. Under these circumstances, a unit franchisee is subject to a fine if they refuse the ASAP dispatch.

D. Denver Management Hierarchy

The area general manager for SuperShuttle Denver is Ross Alexander. The day-to-day operations are overseen by general manager Michael Legette. Legette works at the Employer's Denver facility located at I-70 and 41st Avenue. That facility houses the sales, "cash-in," quality assurance, and dispatch departments. Legette is responsible for overseeing the daily operations in the four named departments, and Employer's ticket counter operations at Denver International Airport (DIA). Legette also oversees the franchise drivers.

The "cash-in" department reconciles the shuttle van driver weekly passenger manifests and issues driver settlement checks. The van drivers go to that facility approximately once a week to pick up their settlement checks, up-coming schedules, and any memoranda issued by the Employer.

The quality assurance department is responsible for monitoring the entire dispatch system for compliance with regulations and guest service standards. The quality assurance employees conduct random telephone surveys of guests, review guest comment cards, investigate complaint calls and letters, and conduct the "mystery rider/quality observer" program. This department also conducts bi-monthly vehicle inspections and has the right to conduct additional inspections upon 12-hours verbal or written notice.

The dispatch operations are overseen by the Director of Unit Franchising (also referred to as "franchise manager"), David Schmidt, who reports directly to

Legette. Reporting to Schmidt are four "managers-on-duty" referred to as MODs.[7] These four managers are assigned to various shifts to cover the 24 x 7 dispatch operations. The current MODs are Alan Russell, Sean Steiner, Sean Frere, and fourth unnamed MOD who recently replaced James Kummerow.[8] The dispatchers are responsible for monitoring the radio and shuttle van GPS systems of drivers assigned to do door-to-door pick-ups, the drivers assigned to the downtown Denver hotel circuit, and the vans at DIA engaged either actively in curbside drop offs or pick ups or awaiting dispatch in the DIA holding area.

E. Unit Franchisees' Terms and Conditions of Employment

1. Unit Franchise Agreement:

SuperShuttle Denver currently has 86 unit franchisees. These unit franchisees annually sign a Unit Franchise Agreement (UFA). The UFA is between SuperShuttle Denver and an individual driver, or a legal entity such as a partnership or limited liability corporation formed by a driver. A unit franchisee is not allowed to enter into more than one UFA, or have more than one van. The UFA states that the city licensee "strongly recommends that Franchisee form a business entity to act as the Franchisee and obtain a tax identification number from the Internal Revenue Service." Despite this encouragement, the evidence establishes that there is only one unit franchisee who has formed and LLC, and that occurred in November 2009. The UFA contains a section designed to specify the unit franchisees' hours of operation for either an "AM Franchise," "PM Franchise," or "Overnight Franchise." Many of the UFAs entered into evidence, however, did not have the some or all of the spaces in this section completed.

[7] The Employer uses the term "manager-on-duty interchangeably with "manager of dispatchers."
[8] Kummerow now works at the Employer's DIA ticket counter operation.

The current annual franchise fee is $1000, although the boilerplate UFA sets that amount at $3500. The unit franchisee also is required to pay the annual $250 fee for the CPUC application for a vehicle decal. Finally, while the UFA provides that neither party has the right to renew the agreement, there is no evidence that SuperShuttle Denver has ever refused to renew a UFA. Unit franchisees regularly continue to operate under expired agreements until such time as SuperShuttle Denver provides them with a successor UFA.

By executing the UFA, the unit franchisee agrees to purchase or lease a van meeting specification as to make, model, color, size, age, and mechanical condition. Approximately half of SuperShuttle Denver's 86 unit franchisees own their own vehicle. The UFA also provides that the unit franchisee agrees to use "all equipment, signage, uniforms, and services" approved by SuperShuttle International, which "shall be purchased from suppliers designated or approved by the city licensee." Unit franchisees agree to orientation and training on SuperShuttle systems, and to any training required by the licensing authorities.

The UFA provides 25 bases for termination of the franchise "with notice and no opportunity to cure." The record reflects that SuperShuttle Denver has only exercised this right three times in recent years. The record does not disclose the circumstances under which the right was exercised. The 25 bases for termination without an opportunity to cure fall into two broad categories. The first category includes breaching the UFA by such conduct constituting express default of the terms of the agreement such as failure to pay franchise fees; unauthorized transfer or assignment of the UFA; unauthorized use of trademarks or trade secrets; seizure of the vehicle by a government official or repossession by a creditor; suspension or termination of any licenses or

certifications; entering into an employment or business relationship with a competitor; felony convictions for conduct reflecting unfavorably on SuperShuttle, under reporting revenue to the city licensee, using unauthorized relief drivers; and obtaining business at the expense of the city licensee.

The second category of breaches which can result in immediate termination of the UFA include items related to on-the-job conduct of the unit franchisees such as receiving excessive traffic citations; being involved in an excessive number of accidents, or in an accident resulting in serious property damage and/or bodily injury; receiving an excessive number of customer complaints; falsifying trip sheets, credit card receipts or training and driving records; testing positive for drugs or alcohol; or violating the city licensee's accessibility, violence, harassment and discrimination policies.

Finally, the UFA provides that certain breaches of the UFA will result in "notice and opportunity to cure." The UFA does not specifically enumerate these items but characterizes them as "noncompliance with any requirement in the Agreement or the Manual or prescribed by the City Licensee."

2. Event reports, default letters, and fines:

The dispatchers, MODs, and franchise managers use the so-called "event report" form to record any unusual conduct or event involving the shuttle van drivers. These event report forms are filled out by whomever is involved with the driver, and can form the basis for a subsequent default letter. The event report indicates the date and time of the event, who filled out the form, the name and van number of the involved driver, and a description of the event. If the "event" involves a specific customer, a block of information related to the customer is also filled out. There is also an "action taken" section at the bottom of the form. That section was left blank on most of the event

reports entered into evidence. The event reports are also used to record customer complaints about a discourteous driver or poor driving; unauthorized loading of passengers assigned to a different van; failure to timely bid on to Nextel system at shift start, or quitting before the end of shift; failure to report for work for a given shift; and altering the fares quoted by SuperShuttle Denver for specific passengers. The event reports are also used in instances where dispatchers make mistakes costing the drivers fares, such dispatching two vans for the same pick up. The drivers are then made whole for the amount of the fare based on the dispatcher's error.

The driver misconduct event reports often result in the Director of Unit Franchising sending the unit franchisees a form letter constituting "official notification" of default of the UFA. These form letters have a section which is filled in for the event at issue, stating the date of default, type of default, and UFA article at issue.[9] The vast majority of the default letters refer to Article 4, Operations by Franchisee, Section F Reservations, Dispatch, Cashiering, and Vouchers. Some of the letters also contain a brief narrative of the event at issue. The letters end with the boilerplate statement: "This notice falls under 'With Notice and Opportunity to Cure,' as such, any further violations may result in the termination of your Unit Franchise." Examples of infractions listed on the default letters entered into evidence include no call/ no show; failure to report for or abandoning shift; failure to follow dispatch procedures; self-dispatching; driver not in uniform; failure to provide 60-day inspection; failure to comply with cashiering and reporting requirements; and a variety of unsafe driving complaints.

The Employer reserves the right to fine unit franchisees for violating certain policies. On January 23, 2009, the Employer issued a memo reminding the drivers of

the following fine schedule: $50 fine for "rolling-off" early without MOD approval; $100 fine for working on unscheduled days without approval of franchise manager; $100 fine for no show on a scheduled shift; $50 for being out of uniform; and $50 for vehicle condition not meeting standards. It appears, however, that the Employer infrequently issues fines to unit franchisees because, while there were dozens of event reports and default letters entered into evidence, only about five of the event reports state that a fine was being assessed.

3. Financial remuneration:

Under the franchise agreement, drivers franchised for AM and PM Shifts are obligated to pay 38 percent of their revenue for transporting passengers to the Employer. Drivers franchised for Overnight Shifts are required to pay 28 percent of their revenue. Drivers "cash out" on a weekly basis by submitting their daily passenger manifests to the cash-in department. These manifests set forth the number of passengers, dollar amount of fares received, whether that revenue was from cash, credit cards, or SuperShuttle's prepaid systems including airport counter tickets or on-line vouchers, and whether the fares were discounted based on coupons issued by SuperShuttle Denver. The Employer then reconciles the drivers' manifests, deletes fees owed to SuperShuttle Denver by the drivers including annual franchise payments if the driver elects to use a payment plan to distribute these payments over the course of the year, vehicle leases if the driver does not own the vehicle, vehicle liability insurance payments, and DIA AVI fees, and either issues a check, or informs the driver of the amount needed to be

[9] The event report "action" section may also state that a default letter would issue.

tendered to SuperShuttle Denver. Typically the drivers do not turn in cash because their paper receipts from voucher payments are at least equal to the 38 percent of the weekly fares owed to SuperShuttle Denver.

The Employer does not do any tax withholding, nor does it issue W-2 forms to the drivers. The drivers are responsible for any speeding, parking, or other traffic enforcement tickets used by authorities including DIA. The drivers also pay for all of their gasoline and maintenance expenses. They do not park the vans at the Employer's facility when not in use, but park their vehicles at their homes or make other parking arrangements.

4. Vehicles:

About half of SuperShuttle Denver franchisees own their own vehicle. The rest lease vans through Veolia Transportation. Leased vehicles must be maintained by Yellow Cab's maintenance facility. The vehicles must comply with specifications set forth in the Unit Franchise Operations Manual. The specifications include the requirement that the vehicle be painted "SuperShuttle Blue" or white. If unit franchisees want their vans to be blue, they must obtain the blue paint formula specifications from the Employer. Blue vehicles must also meet the yellow decal specifications. If the van is white, the unit franchisee must display the trademark blue and yellow decals. The vehicle interiors must be blue or grey. Vehicles must be replaced when there are either five years old or exceed 450,000 miles. Finally, the vans must be specified Dodge, Ford or Chevrolet models, and must be outfitted with seat belts for eight passengers, unless special permission is obtained.

The only restriction on personal use of the vans is a prohibition on use of a SuperShuttle-marked vehicle for transportation service for another company or as a side transportation business by the unit franchisee. There is no restriction on personal use of the vans for family, day-to-day, or vacation transportation, or on who may be allowed to drive the vehicle when it is not in service for SuperShuttle Denver. There is also no restriction on using the vans for personal businesses unrelated to the transportation of passengers.

Unit franchisees must also abide by a number of policies related to their vehicles. These include restrictions on driver cell phone use, customer and driver seatbelt requirements, and rules regarding stowage of luggage. Drivers are specifically prohibited from stowing laptop computers in the luggage compartment because of past damage liability.

5. Uniforms:

Franchisee drivers are responsible for providing their own uniforms, and order and purchase them through a specified vendor. The specifications regarding what the uniforms will look like and what trademark patches the drivers must wear are contained in the Unit Franchise Operations Manual. City licenses are allowed to institute their own uniform policy by narrowing the choices contained in the Operations Manual uniform policy. The uniforms allowed can either be a blue SuperShuttle Denver polo shirt with khaki pants or shorts; or plain white collared dress shirt or blouse and black pants. All drivers must wear dark dress shoes with dark socks or stockings, and men or women may wear a tie, or women may wear a scarf. Skirts and dresses are not allowed. DIA requires that uniforms comply with its requirement that the company name only appear on the front and back of

uniform shirts and jackets, and on caps, and sets a size limitation. Finally, the unit franchisees are required to meet certain grooming standards and can be issued default letters for having an unkempt appearance.

6. Work schedules:

As noted, SuperShuttle Denver's operations primarily consist of door-to-door (DTD) service, and scheduled downtown hotel service. The Employer has also recently been certified by CPUC to have scheduled service from hotels in the Golden, Colorado area because of an increase in business in that area. DTD service, which constitutes about half of SuperShuttle Denver's overall operations, originates from the nationwide reservation system described above, and curbside service at DIA.

The scheduled start and stop times, and days of the week for the DTD (AM and PM), and Overnight unit franchisees are contained on a biweekly schedule which is put in the drivers' mail slots at the Employer's facility. The unit franchisees provide the franchise manager with their availability for a given two-week period and the franchise manager produces a schedule based on van availability. The record is silent as to the extent of deviation in these assignments from schedule to schedule.

There are 20 vans scheduled for the downtown hotel runs each day. These downtown shuttle van drivers have a scheduled start time, and are scheduled for either the South downtown hotel run or the North downtown hotel run. These vans start at one hotel, and move to the next hotel of their four scheduled hotel stops in order, and then proceed to DIA. The unit franchisees are mandated to make the scheduled hotel stops, but are free to choose their own route to DIA. The vans pick-up reservations passengers, as well as walk up passengers at the hotel stops.

There are times that there are no passengers at a given hotel, in which case the driver waits the scheduled time, and then moves on to the next hotel on the schedule. These downtown drivers can pick up point-to-point passengers at these stops if the passengers need to go to the area of another scheduled hotel stop. After dropping their passengers at DIA, they wait curbside in the area designated for downtown passengers, and pick up available passengers headed for downtown. After dropping passengers at desired downtown locations, the drivers proceed to the starting hotel for a repeat of the process. The downtown unit franchisees repeat their scheduled route five times per shift, and head home after their last drop off at DIA. There are also times that the downtown drivers pick up DTD passengers through the reservations system, but only if these passengers are located on the driver's direct route to DIA. Since many of the passengers picked up downtown are not scheduled through the reservations systems, these unit franchisees operate on the honor system for reporting the cash passengers. SuperShuttle Denver audits such cash reporting through its Mystery Rider program.

Each day, SuperShuttle Denver has six vans assigned to the recently implemented Golden, Colorado hotel schedule. The Golden run operates similarly to the downtown runs, but involves a combination of DTD pickups and hotel stops. The Golden AM drivers make three roundtrips to DIA because of the added distance. The Golden PM drivers make two scheduled DTD and hotel runs. After 6 pm, the three Golden PM vans are dispatched out of DIA holding area by the dispatchers based on walk-ups and incoming computer reservations. While the Golden runs have fewer passengers than the downtown runs, the fares are

considerably higher than the $19 downtown fare. The Golden fares range from $35 to $75 depending on whether the drop-off is within Golden city limits or outside the city limits.

7. Relief drivers:

Unit franchisees may elect to park their van when they wish to take prolonged time off, but they are also permitted under the UFA to use relief drivers to provide transportation services in the franchisee's van. While the UFA provides that relief drivers are under the direct supervision of the unit franchisee, the relief driver must report for work using the same methods as the unit franchisee, and submit the same paperwork. The relief drivers, however, do not receive fare settlement checks directly from SuperShuttle Denver. Rather, the fare settlement checks go to the unit franchisee, who is responsible for paying the relief driver. Similarly, default letters are sent to the unit franchisee, not the relief driver.

Prospective relief drivers must be screened and approved by SuperShuttle Denver for compliance with CPUC and DIA regulations. The screening includes ascertaining that that the individuals are properly licensed to transport passengers. SuperShuttle Denver also requires that unit franchisees and relief drivers take a defensive driving course, and pass a drug test based on DIA's requirement that drivers be drug free.

While the record establishes that SuperShuttle Denver has screened and approved 14 relief drivers, neither the Employer nor Union elicited any testimony regarding when such screening occurred, or which unit franchisees sought approval for any of the relief drivers. The record is also devoid of evidence regarding whether any of the relief drivers have recently driven SuperShuttle

Denver vans, or the frequency or number of hours these relief drivers were used.

UNION CONFLICT OF INTEREST

SuperShuttle Denver asserts that the petition should be dismissed because CWA has a disabling conflict of interest based on CWA Local 7777's relationship with UTC. Specifically, SuperShuttle Denver contends that it and UTC are competitors in the passenger transportation industry, based on the fact that they are subject to the same CPUC and DIA regulations, have overlapping transportation territories, and compete head-to-head for the highly competitive downtown hotel customer base needing transportation to and from DIA.

A. UTC's Formation

1. UTC's predecessor:

On July 2, 2007, CWA entered into an Agreement for Affiliation between the Professional Taxicab Operators of Colorado Association (ProTAXI), and the Communications Workers of America, AFL-CIO, Local 7777. The Agreement for Affiliation provided that ProTAXI would become a division of CWA, Local 7777, and abide by Local 7777's constitution and bylaws. The Affiliation Agreement also stated that the Union would provide staff support to the ProTAXI Division regarding matters involving CPUC, DIA, the City and County of Denver, and area hotels. CWA was also obligated to provide attorneys and lobbyists to advocate for the ProTAXI division with the Colorado General Assembly. The Union's advocacy included successfully lobbying for a change in the law through the Colorado legislature, which permitted the CPUC to lower transportation industry entry standards allowing for the legal formation and

certification of UTC to operate as a taxicab cooperative. The change in the law took effect July 1, 2008.

In anticipation of the change in law by the Colorado General Assembly, ProTAXI Union members met in January 2008, to formulate plans to form UTC. In April 2008, the 262 ProTAXI members sought and obtained legal advice regarding the requirements for applying to the CPUC for authorization to form a cooperative to provide taxicab service in the City and County of Denver. The record does not establish whether the Union and ProTAXI ever formally ended their Affiliation Agreement, but it appears that ProTAXI was subsumed by UTC upon UTC's formal legal creation.

2. UTC's incorporation:

On June 9, 2008, UTC filed its Articles of Incorporation of a Cooperative with the Colorado Secretary of State. UTC listed the Union's address (2840 S Vallejo, Englewood, Colorado), as its principal office street address. Abdi Buni was named as the registered agent, and incorporator for UTC. Abdi Buni's address was also given as CWA's address. In June 2008, UTC also adopted cooperative bylaws, and entered into a Colorado Commercial Lease with CWA, effective July 1, 2008, to rent office space and use of the parking lot at the Union hall. UTC entered into a successor lease effective July 1, 2009, with CWA, Local 7777, increasing the amount of monthly rent, and increasing the size of the office space UTC rents from the Union. That lease also covers all utilities except telephone service and includes the right for the UTC members to park their taxicabs at the Union hall when the cabs are not in service.

On July 1, 2008, UTC filed an application to operate as a common carrier by motor vehicle for hire with the CPUC for a permit authorizing the 262 individual UTC members to begin to offer taxis service under the UTC name in the City and County of

Denver. This application was granted, and UTC has had 262 cooperative members and corresponding taxicabs since that time.

3. UTC membership

UTC currently has 262 member drivers, which is the maximum number UTC can have based on its current CPUC certification. UTC has an office staff of eight employees, including dispatchers, call takers, a cashier and bookkeeper. The office employees are overseen by general manager Guadata Brasso. In order to join the cooperative, an individual must sign a UTC Membership Agreement and be accepted into membership by the UTC Board. UTC members pay an initial membership fee. Once accepted, they begin to pay annual membership dues which may be paid on a weekly, monthly, quarterly, or annual basis.[10] UTC members are required to become members of CWA, but are not required to pay initiation fees.

UTC is overseen by a four-member board of directors and five official officers. Abdi Buni was the first president of UTC. Buni, however, was hired as a paid organizer for CWA Local 7777 in July 2009. Accordingly, at the August 2009 Board of Director's meeting, Bushra Saido was elected as Buni's successor. At that same meeting, Yousef Salad and Mengistab Desta were elected as Vice Presidents; Million Mengistu was elected as Secretary; and Takele Merse was elected as Treasurer. The current UTC Board Members are: Abdi Buni, Stan Hawton, Cristian Mateescu, and Gamachu Said.

B. Relationship Between CWA and UTC

The documentary evidence regarding a relationship between CWA and UTC initially establishes that they have formal landlord/tenant relationship based on the lease

[10] The record does not reflect the amount of the initiation fee or annual membership fee because CWA objected to the Employer's attempt to elicit that evidence.

for the UTC office space. Other aspects of the relationship between CWA and UTC are more difficult to define. While the record does not reflect direct involvement by CWA in the legal formation of UTC, as discussed, the Union was involved in lobbying efforts with the Colorado General Assembly to seek a change in the law to allow for formation of UTC, which resulted in the elimination of ProTAXI, with which the Union did have a formal affiliation agreement. The record also establishes that CWA does not have a traditional collective-bargaining relationship with UTC to represent the interests of the cooperative taxi drivers, *vis-à-vis* UTC.

The relationship between UTC and CWA is also evidenced by the fact that in July 2009, the Union hired then UTC President Abdi Buni as a paid organizer. While Buni is no longer UTC president, he still holds a position on the UTC board of directors. Buni was involved with the Union as a contact person for ProTAXI, and as such, was regularly copied on e-mail correspondence between UTC and the Union before he was hired as a paid organizer. Buni still is regularly copied on e-mail correspondence between UTC and CWA, and in fact continues to use the same ProTAXI e-mail address he used before the inception of UTC.

Finally, there is evidence that CWA representatives conducted the August UTC Board of Directors meeting at which Buni's successor was elected, and oversaw the election of officers and board of directors members at that meeting.

Notwithstanding the lack of a collective-bargaining relationship, UTC pays a monthly per capita fee of $28 to CWA for each of its 262 members, which UTC and CWA characterize as "dues." There is no evidence that the UTC members submit applications for actual membership in CWA, and testimonial evidence establishes that they are not required to pay union initiation fees. These monthly dues paid directly by

UTC to the Union amount to $7336 per month. These monthly per capita dues are in addition to the monthly rent paid by UTC for leasing office and parking lot space and covering utilities. UTC also directly reimburses CWA for such office expenses as the costs of photocopying.

The testimony of CWA, Local 7777's current President, Lisa Bolton, establishes that the monies paid by UTC on behalf of its drivers are mingled with dues from its traditional members, and used for the Union's general operating expenses. The evidence further establishes that in exchange for the monthly "dues" paid to the Union by UTC, the Union provides the same services to UTC that it was obligated to provide ProTAXI pursuant to the written Affiliation Agreement, despite the absence of a written agreement. In this regard, Union President Bolton testified that these services include lobbying for legislation favorable to UTC with the Colorado legislature. Bolton also testified that she has held meetings with "parking enforcement" on behalf of UTC drivers when they believe UTC is being singled out for ticketing. Bolton and other Union officials also meet with government officials regarding the herdic licenses taxi drivers must have to operate, and excise and license plate officials so that the Union can educate UTC drivers regarding issues that arise for renewals. Bolton has also met with officials at DIA regarding heater and air conditioning issues in the building made available to Muslim taxi drivers for daily prayers. CWA representatives have also accompanied UTC members to court to assist them with plea bargaining regarding trespassing tickets.

In August 2009, the also Union intervened on behalf of UTC in a dispute at the Hyatt Regency Colorado Convention Center downtown hotel. That dispute involved the Hyatt Regency filing a formal CPUC complaint against UTC for "bullying other

companies out of line." In October 2009, UTC sought the Union's assistance in another dispute at the Hyatt Regency Convention Center. Specifically, UTC sought to have the Union assist in forcing the Hyatt Regency to not allow managers affiliated with SuperShuttle Denver to solicit customers in the hotel lobby.

A few days later, UTC sought assistance from the Union after it was informed that the Cherry Creek Mall intended to authorize two competitor cab companies exclusive access to the mall. CWA sought legal advice from its legal counsel regarding the action taken by Cherry Creek Mall; intervened on UTC's behalf with the mayor's office; and attempted to contact a mall official to discuss the dispute. CWA also organized a demonstration at the mall during the Thanksgiving holiday weekend, and created the leaflets used in the Cherry Creek Mall campaign on behalf of UTC. An announcement for the leafleting action at Cherry Creek Mall was put on the CWA Local 7777 website encouraging all drivers and volunteers to meet at the Local at 9:30 a.m., so the Union could put one passenger in each UTC taxi to be transported to the mall where they would leaflet until 12:30 p.m. At that time the Union leafletters would start calling for UTC taxis to come back and pick them up at the Cherry Creek Mall.

Finally, the evidence establishes that CWA was involved in researching obtaining Smith Defensive Driving Training for the taxi drivers, which included investing $5,066 for a Smith Trainer to train up to four Union members to deliver the classes to the UTC drivers. CWA also provides photocopying services to UTC at the rate of 3 cents per page, and provides free advertising on the Union's website.

LEGAL ANALYSIS AND CONCLUSIONS

As noted, there are two primary issues in this case: 1) Whether the unit franchisees are employees within the meaning of Section 2(3) of the Act, or

independent contractors as asserted by SuperShuttle Denver; and 2) whether there is a disabling conflict of interest based on the Union's relationship with UTC warranting dismissal of the petition. I find, based the record as a whole, and as will be fully explained below, that the unit franchisees are not independent contractors as asserted by the Employer. I also find that the Employer has established that CWA has a disabling conflict of interest based on its relationship with UTC, and I am dismissing the petition on that basis.

SuperShuttle Denver also raised a third issue for the first time in its post-hearing brief. Namely, that the unit franchisees are statutory supervisors within the meaning of Section 2(11) of the Act because they purportedly hire relief drivers. I find that since the Employer did not expressly raise this issue at the hearing, and, thus, the parties did not litigate the supervisory status of the unit franchisees, the record is devoid of sufficient evidence to warrant analysis of this complex issue. In this regard, while the record provides a list of names of purported relief drivers, there is no evidence regarding the relationship between the relief drivers and any current unit franchisees. Accordingly, I find that the Employer has failed to meet its burden of establishing that the unit franchisee shuttle van drivers are statutory supervisors. See e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

A. Independent Contractor Issue

1. Legal framework:

As noted by both parties, Board law establishes that the burden is on SuperShuttle Denver, to prove that the unit franchisees are not employees within the meaning of Section 2(3) of the Act. *BKN, Inc.*, 333 NLRB 143, at 144 (2001). Section 2(3) of the Act, as amended by the 1947 Labor Management Relations Act (Taft-Hartley Act), provides that

the term "employee" does not include "any individual having the status of independent contractor." The meaning of this 1947 amendment was first considered by the Supreme Court in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). The Supreme Court held that the "obvious purpose of the amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." The Supreme Court also stated that there was no "shorthand formula" or "magic phrase" associated with the common-law test, instead, under the common-law test "all incidents of the relationship must be assessed and weighed with no one factor being decisive."

In *Roadway Package System, Inc.*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998), which were decided the same day, the Board rejected the so-called "right of control" approach to analyzing independent contractor status. The right-of-control approach had evolved over time and resulted in greater weight being given to "the manner and means" of the work done by the individuals at issue than to other factors. The Board in *Roadway* and *Dial-a-Mattress*, affirmed that the proper analysis to be used in determining whether an individual is an employee or an independent contractor under Section 2(3), is the common-law agency test which involves the multifactor analysis set forth in Restatement (Second) of Agency, Section 220(2).[11] In *Roadway*, the Board characterized the need for such analysis as follows:

[11] The common law factors include, *inter alia,* "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by the time or by the job"; "the length of time for which the person is employed"; whether "the work is a part of the regular business of the employer"; and the intent of the parties. *FedEx Home Delivery* v. NLRB, 563 F.3d 492, fn 1 (D.C. Cir. 2009).

> The determination of 'independence' ... ultimately depends upon an assessment of 'all of the incidents of the relationship ... with no one factor being decisive.'" *NLRB v. United Ins. Co.*, 390 U.S. at 258; ... see also Restatement (Second) of Agency §220 (1958).") As the Board stated in *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982): "Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other. *Roadway*, supra, at 850.

Both parties urge me to analyze the factors present in this case under a recent decision by the D.C. Circuit Court of Appeals in *FedEx Home Delivery* v. NLRB, 563 F.3d 492 (D.C. Cir. 2009). In *FedEx,* the D.C. Circuit Court of Appeals rejected the weight given by the Board to evidence regarding the entrepreneurial opportunities of the drivers at issue, which the Court concluded outweighed other common law factors. Specifically, the Court stated:

> We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. Though evidence can be marshaled and debater's points scored on both sides, the evidence supporting independent contractor status is more compelling under our precedent. The evidence might have been stronger still had not the Regional Director erroneously excluded the national data. But even as the record stands, the Board's determination was legally erroneous. *Id*., at 504.

The Employer argues that the Court in *FedEx* adopted a new test which, "shifted the emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'" I disagree with the Employer's characterization that the

Court adopted a "new test" in *FedEx*. As noted, the Court specifically stated that it analyzed all of the common law factors. The quote relied upon by the Employer was part of the Court's discussion of the Board's analysis of the common law factors and its view that in FedEx the entrepreneurial factors predominated. Board cases decided since *Roadway* and *Dial-a-Mattress*, including *St. Joseph's News-Press*, 345 NLRB 474 (2005), and *The Arizona Republic*, 349 NLRB 1040 (2007), explicitly affirm the *Roadway* and *Dial-a-Mattress* analytical framework. In both those cases, the Board engaged in an analysis of all the Restatement factors present before concluding that the evidence of entrepreneurial factors outweighed the other factors, thereby favoring a finding that the individuals at issue were independent contractors.

Applying the common-law agency test to the facts of this case, I find that the factors weigh more strongly in favor of employee status for the SuperShuttle Denver van drivers. See e.g. *Elite Limo Limousine Plus, Inc.,* 324 NLRB 992 (1997), *O'Hare-Midway Limousine Service, Inc.,* 295 NLRB 463 (1989), enf'd, *NLRB v. O'Hare-Midway Limousine Service, Inc.,* 924 F.2d 692 (7th Cir. 1991). While both of these cases were decided under the pre-*Roadway* right of control test, many of the factors present in these cases are similar, if not identical to the facts present herein, supporting my finding that the unit franchisees are statutory employees.[12] Moreover, I find that the

[12] In *St. Joseph News-Press*, supra at 478, the Board addressed the viability of its pre-*Roadway* holdings as follows: "In determining the status of the carriers in this case, we rely on the Board's analysis in *Roadway* and *Dial-A-Mattress*. With respect to the Respondent's argument that *Roadway* did not change the legal landscape, and that thus the right of control test is still applicable, we note that although *Roadway* does not directly address the continuing viability of the pre-*Roadway* cases, the Board's analysis in those cases recognized, as does Supreme Court law, that both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors. Further, we note that since *Roadway*, the Board has continued to cite pre-*Roadway* cases that are consistent with the principles set forth there. The Board will continue to rely on the analysis in such cases, without adopting the Respondent's characterization of the development of the law. [Emphasis added.]"

entrepreneurial factors present in *FedEx*, *St. Joseph News-Press*, and *The Arizona Republic* are almost non-existent herein.

The *O'Hare-Midway* factors are particularly compelling because of the similarity to the factors present herein. Thus, the O'Hare-Midway similarly selected a.m., p.m. or all-day shift, but were not allowed to change their work schedule, or terminate a shift early, without the company's permission. Drivers kept 40 percent of gross fares and paid the remaining amount to the company. The drivers were required to adhere to company rules regarding the manner in which they collected fares, including maintaining records of each fare received. O'Hare-Midway had a mandatory dress code, and retained the right to fine or reprimand the drivers for failure to comply with company procedures. Finally, the Company provided no benefits to its drivers, and did not do any tax withholding.

2. Analysis of the common law factors:

While the Restatement on Agency lists ten specific factors for consideration, I have grouped those factors into five categories based on the specific evidence under consideration herein.

a. Unit franchisees' work is a part of regular business of Employer

The facts establish that between 1998 and 2002, SuperShuttle International changed its entire method of operations from a direct employment model to a franchise model. In this new model, city licensees such as SuperShuttle Denver in turn entered into UFAs with individual drivers. As a result, individuals seeking to work for SuperShuttle Denver must sign an annual UFA, and agree to be bound by the terms of the Unit Franchise Operations Manual. While the change in SuperShuttle

International's business model, and the language of the UFA indicate that the intent of SuperShuttle International is to establish an arms-length, independent contractor relationship with the unit franchisees, I find that this intent factor is outweighed by other factors.

The evidence establishes that unit franchisees have no cognizable bargaining power allowing them to negotiate with SuperShuttle Denver regarding any of the terms of the UFAs. SuperShuttle International unilaterally promulgates the standard UFA, and related Unit Franchise Operations Manual, for use by its city licensees, and reserves the right to unilaterally change the terms from year to year. There is no evidence that any unit franchisee has successfully negotiated changes in any of the terms of the UFA, or any policies contained in the operations manual. Additionally, while the UFA provides that it has an annual term, the record establishes that the shuttle drivers continue to operate under expired UFA's until the Employer provides them with successor franchise agreements. There is also no evidence that SuperShuttle Denver has declined to renew a unit franchisee's agreement upon expiration, and instances of mid-term UFA terminations are rare.

Moreover, the unit franchisees are not independently performing a discrete or unique part of the Employer's business, they are responsible for performing the entirety of SuperShuttle Denver's normal business operations in the Denver metropolitan area; namely, transporting passengers and their luggage to and from DIA, or other destinations. Because the unit franchisees are the sole face of SuperShuttle International in a particular arena, SuperShuttle International exercises a significant amount of control over the day-to-day functions of the unit franchisees, to protect and enhance its nationwide brand.

b. The method of payment

Unit franchisees charge customers established flat-rate fares and do not have any authority to deviate from the fares set by the Employer, and approved by CPUC. Similarly, unit franchisees must honor discount coupons authorized by SuperShuttle Denver, but cannot offer their own discounts. Unit franchisees must keep detailed daily records of the fares they collect, and whether those fares are from vouchers, credit cards, or cash. This paperwork is turned in weekly, and reconciled by the Employer. AM and PM franchisees are compensated at the rate of 72 percent of the gross fares they collect, and graveyard franchisees are compensated at the rate of 68 percent. After reconciling the drivers' weekly manifests, the Employer deducts its percentage of the fares collected by the unit franchisees, liability insurance payments, AVI fees, vehicle lease payments, and any other fees or fines which might be owed and issues a settlement check to the unit franchisee. SuperShuttle Denver also audits the unit franchisees through the mystery rider program, and issues default letters to drivers who failed such audits, including failure to list cash fares on their manifest.

The Board has held in a number of taxicab and airport transportation service cases that the fact that the drivers' compensation is based on a percentage of fares collected, supports a finding that the drivers are employees because there is direct correlation between the employer's income and the fares collected. Thus, the employer has a direct financial stake in the work performed by the driver. In cases where the drivers pay a flat fee to the company, the Board has found the drivers to be independent contractors because the drivers have a strong incentive to maximize their trips, since, once the flat fee is recouped, their income is largely profit. In addition, the Board has held that a flat fee insulates a company from variations in income because, regardless

of the drivers' actual earnings, the employer receives the same amount. See, e.g. *Elite Limousine* and the cases cited therein. Accordingly, I find that the factors related to the method of payment and significant control over pricing, record keeping, and through the mystery rider audits conducted by the Employer weigh in favor of employee status.

c. Instrumentalities and tools

The record establishes that the about half of the unit franchisees own their vans and the other half lease their vans through SuperShuttle Denver's parent company. The evidence further establishes that the only restriction placed on the unit franchisees is that they cannot use their SuperShuttle-marked vans in businesses that compete directly with SuperShuttle Denver. While these factors weigh in favor of a finding of independent contractor status, I find that there are various other related factors which overcome these two factors. Among the related factors are various mandates placed on the unit franchisees by SuperShuttle Denver. The Employer requires the unit franchisees to maintain specific levels of liability insurance, which they must purchase through a designated carrier by payroll deduction. Moreover, the Employer exercises direct control over the make, model, age, size, and mechanical and physical condition of the vehicles, including performing bimonthly vehicle inspections. SuperShuttle Denver issues default letters to unit franchisees if they fail an inspection, or their vehicle is found in default. The Employer also has rigid requirements for the color and logos in the vehicles, including that the unit franchisees use specific proprietary paint color formulas. Vehicles must be replaced when they reach either five years of age or 450,000 miles. Similarly, the Employer has a strict uniform policy and grooming standards to which the unit franchisees must adhere. If the drivers are observed out of uniform or unkempt, the Employer issues them default letters, including threatening to

purchase new uniform items for the drivers and takes reimbursement from their settlement checks.

The Employer also mandates specific communications equipment, and issues default letters for such things as failure to activate the Nextel system at the start of a scheduled shift. Finally, and most significantly, the Employer mandates that the vehicles have a GPS system that allows the Employer to monitor the vehicle even when it is not in service during scheduled shifts. This monitoring by the Employer includes review of weekly reports charting the speed ranges with which the vehicle was driven and issuance of default letters for traveling at excessive speeds.

d. Control over the details of work.

In addition to SuperShuttle Denver's control over the work details addressed above, I find that the Employer exercises control over other significant details of the daily work performed by the drivers, supporting my finding of employee status. The Employer specifically urges a finding that the unit franchisees are independent contractors because the door-to-door drivers can review the available reservations on their Nextel system and bid or pass on the various available customers. While this is an important consideration, I find that it is outweighed by other controls placed on the unit franchisees. Specifically, DTD drivers are assigned to passengers by the computer system if no DTD driver accepts a bid. All of the drivers can be assigned so-called ASAP customers by dispatchers, which the unit franchisees are not at liberty to turn down. The drivers assigned to downtown routes (about half the unit franchisees) have no option to select their customers, and can be issued default letters for refusing to take passengers.

While the unit franchisees do have options related to whether they work AM, PM,

or Overnight, SuperShuttle Denver controls the number of drivers assigned to each time frame. While drivers can inform the Employer of specific dates they are not available, they have no latitude to elect to take a day off without prior notification. They also cannot start work early or late, or leave work early or late without seeking permission from the MODs. All of the unit franchisees are required to start work at their scheduled time, and if they have not signed onto the Nextel system, the Employer checks their vehicle location via GPS and a dispatcher attempts to contact the driver by radio. The unit franchisees are also required to go through orientation and training on the Employer's equipment and systems when they first become a franchisee, and they are required to take periodic defensive driving courses offered through an entity related to SuperShuttle Denver, as well as other periodic on-the-job training mandated by the Employer. Finally, the unit franchisees are subject to default letters and fines for infractions of the myriad of policies and rules established by the UFA, Operations Manual, and various memoranda issued by the franchise manager, which weigh heavily in favor of my finding of employee status.

e. Entrepreneurial opportunities

In assessing whether the individuals possess entrepreneurial opportunities weighing in favor of a finding of independent contractor status, the Board looks at a variety of factors. Many of these factors discussed above, including method of payment, independence regarding setting work schedules, and vehicle ownership, establish that the Employer has placed significant limitations on the entrepreneurial opportunities of the unit franchisees. Other factors to be considered include whether the unit franchisees have established their own businesses, and are operating as independent companies. Despite language in the UFA encouraging unit franchisees to

do so, the Employer only provided evidence of one individual who very recently set up an LLC. The Employer has, in fact, established some barriers to entrepreneurial activities, which warrant a finding that the entrepreneurial opportunities are insufficient to establish independent contractor status. In this regard, unit franchisees are not allowed to franchise for the operation of more than one vehicle. They are also not allowed to hire relief drivers without the relief drivers being approved by the Employer. Finally, the unit franchisees are not allowed to transfer their franchise without prior approval by the Employer.

B. Disabling Conflict of Interest Issue

At issue is whether the relationship between CWA and UTC conflicts with the obligations of the Union as a potential collective-bargaining representative of the SuperShuttle Denver van drivers, as contended by the Employer.

1. Legal framework:

In *St. John's Hospital and Health Center*, 264 NLRB 990 (1982), the Board analyzed the line of cases involving disabling conflicts of interest by unions. It characterized *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954), as "the seminal case establishing the conflict-of-interest doctrine." In *Bausch & Lomb*, the Board had found that the employer was no longer obligated to bargain with a union because the union had become a direct business competitor of the employer. The Board in *Bausch & Lomb*, emphasized the important interests of the bargaining unit employees when it stated:

> What is envisioned by the Act is that in attempting to [reach] an agreement, the parties will approach the bargaining table for the purpose of representing their respective interests and having approximately equal economic power. The employer must be present to protect his business interests and the union must be there with the single-minded purpose of

> protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose. As the Supreme Court has stated: "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." [*Ford Motor Co. v. Huffman,* 345 U. S. 330, 338.] . . . In our opinion, the Union's position at the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective-bargaining process. For, the Union has acquired a special interest which may well be at odds with what should be its sole concern--that of representing the interests of the Respondent's employees. In our opinion, the situation created by the Union's dual status is fraught with potential dangers. [Emphasis added.] *Id*., at 1559.

In *St. John's Hospital*, the Board similarly found that the petitioning union, which operated a nurse registry that dispatched 80 percent of the registered nurses to St. John's Hospital, had an "ulterior purpose" that conflicted with the requirement that a collective-bargaining agent have a "single-minded purpose of protecting and advancing the interests" of unit employees. *St. John's Hospital*, supra, at 993.[13] In reaching this conclusion, the Board also relied on *Sierra Vista Hospital, Inc.,* 241 NLRB 631, 634 (1971), which held that: "[A]n Employer has a right to engage in collective bargaining which is not influenced by interests the bargaining representative may have outside its employee representative capacity."

This line of cases was also discussed in *Western Great Lakes Pilots Association*, 341 NLRB 272 (2004). In that case the Board affirmed the ALJ's finding that no disabling conflict existed where the union's only action had been to support rule making by the Coast Guard which, if enacted, could have put the employer out of business. The judge noted that the union had not instituted or formulated the rule making at issue, but merely had supported one of the proposals before the Coast Guard rule making

[13] See also, *Visiting Nurses Association, Inc. Serving Alameda County*, 254 NLRB 49 (1981).

body. In finding no disabling conflict, the ALJ stated:

> Here, there is no evidence that the Union operates, or ever intends to operate, a pilotage enterprise in competition with Respondent. Nor is there evidence that the Union is either a supplier/customer of Respondent or, beyond that, a creditor of Respondent. Furthermore, there is no evidence that the Union operates any type of enterprise that would naturally give rise to an inability to bargain single-mindedly on behalf of unit employees of Respondent represented by the Union or, in some other fashion, that would naturally compromise the collective-bargaining process as contemplated by the Act. *Id*., at 282. . . .
>
> Here, there is no other employee-unit, represented by the Union, that would benefit from implementation of the unified pilot management proposal. Moreover, implementation of that proposal cannot be accomplished through the collective-bargaining process. The only way that proposal can be implemented is through action by the Coast Guard or, perhaps, through legislation passed by Congress and signed by the President of the United States. *Id*., at 282.

In another of the *Bausch & Lomb* line of cases, *Alanis Airport Services, Inc.*, 316 NLRB 1233 (1995), the Board reversed the Regional Director's finding that the intervening union should be disqualified as a potential representative of the unit of baggage handlers because of the union's involvement with a newly-formed company that intended to engage in baggage handling competition with the employer. The intervenor, International Association of Aerospace Workers, District Lodge 40 (IAM), had an exclusive contract with United Airlines that any subcontracted work must be done by an IAM-represented contractor. United Airlines, and several other airlines, had petitioned the Miami Dade Commission to issue the airlines general permits to provide baggage services. At the time of the Board proceedings, commission hearings had been held, but no decision had issued. In anticipation of a favorable commission ruling, IAM was involved in the formation of Miami Airport Skycaps, Inc. (MAS). The objective of forming MAS was to secure United Airlines' baggage handling work for IAM members if the commission granted the permits.

The Board determined that since of plans of MAS had not yet, and might never, materialize, IAM's involvement in MAS did not constitute a current conflict, thus, it was premature to make a finding that the union had a disabling conflict of interest. The Board also stated:

> We find it unnecessary to pass on the Intervenor's contention that its involvement with MAS is too limited to warrant a conclusion that the Intervenor controls or has a symbiotic relationship with MAS, because in any event, for the reasons set forth above, there is no showing that MAS is in competition with the Employer. *Id*., at fn 4.

Notwithstanding that the Board did not address the intervenor's contention that its involvement was too limited based on of its finding that there was no current competition because MAS had not yet been authorized to handle baggage, the Board's analysis in *Alanis* is instructive because the facts regarding IAM's involvement with MAS are similar to CWA's involvement with UTC. In this regard, the Board listed extensive details of the relationship between IAM and MAS, and also specifically stated that it did not question that the new company would, in fact, compete with Alanis if it obtained a permit allowing it to do so. *Id*., at fn 3. The Board also stated:

> In sum, there is insufficient evidence that MAS is a competitor of the Employer or that the Intervenor would misuse its Section 9 status as set forth above. If there is a change of circumstance, in either respect, a party may raise the issue at that time through appropriate procedures under the Act. [Emphasis added.] *Id.*, at 1234.

Thus, the Board left open the possibility that if IAM won the election, and MAS commenced operations, certification could be revoked pursuant to the Board's holding in *Bausch & Lomb*.

The facts regarding the relationship between IAM and MAS were as follows. MAS was owned by 55 shareholders, each of whom owned one share of stock. Two of the shareholders were officers of IAM (president and secretary-treasurer), who also

served on the five-member MAS board of directors. IAM's lodge president was also one of the two incorporators and served as the registered agent for MAS. The articles of incorporation of MAS provided that the corporation could issue shares only to dues-paying members of the IAM. The MAS shareholder baggage handlers formed a new IAM local, Local 626, with the object of representing MAS' employees. MAS and Local 626 shared office space at a building owned by the IAM and two other IAM locals, and MAS was permitted to use that space rent-free during their initial 6-month formative period.[14]

2. Analysis and conclusions:

Based on the above-cited authority, I find that the relationship between CWA and UTC creates a disabling conflict with the obligation of the Union as a potential collective-bargaining representative of the SuperShuttle Denver drivers to have single-minded purpose of advancing the interests of the SuperShuttle Denver employees. In reaching this conclusion, I am mindful that the facts do not establish that CWA has an actual ownership interest in UTC, similar to that present in *Bausch & Lomb*; or that CWA's interests are analogues to the nurse registry operated by the union in *St. John's Hospital*. I am persuaded, nonetheless, that a disabling conflict exists because of the inherent likelihood that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by interests outside its representative capacity based on its relationship with UTC.

a. UTC and SuperShuttle are competitors

[14] The Union, in its post-hearing brief distinguished various other cases in anticipation of the Employer's arguments. I find those cases inapposite to my determination that a disabling conflict exists herein.

In reaching my conclusion that a disabling conflict of interest exists, I initially find that SuperShuttle Denver and UTC are, in fact, competitors. The evidence establishes that they both compete for passenger traffic to and from DIA, throughout the Denver metropolitan area. SuperShuttle Denver and UTC are also both subject to regulation by the same regulatory agencies, and compete for a finite number of licenses issued for passenger transportation in their overlapping Denver metropolitan territories. The fact that UTC and SuperShuttle are in competition is further evidenced by the fact that UTC recently sought CWA's assistance in a dispute between UTC and SuperShuttle Denver at the downtown Hyatt Regency convention center hotel. This dispute arose when UTC contended that SuperShuttle Denver was getting an unfair competitive advantage because it was being allowed by Hyatt management to solicit for passengers in the lobby of the hotel, when UTC was not similarly allowed such access.

Based on my finding that UTC and SuperShuttle are competitors, and that UTC, unlike MAS in *Alanis, supra*, is presently in operation as a competitor of SuperShuttle Denver, I must examine the nature of the relationship between CWA and UTC. While this relationship is not easily defined within the framework of the above-cited Board cases, it is vastly different than a traditional collective bargaining relationship. In this regard, I find that CWA's involvement with UTC is most closely analogous to IAM's involvement with MAS in *Alanis, supra.* As noted above, while the Board declined to address IAM's contention that its involvement with MAS was too limited to establish a disabling conflict of interest, the Board, nonetheless, made specific findings of fact regarding the relationship between IAM and MAS, and stated that if circumstances regarding MAS changed, a party could raise the conflict issue through appropriate procedures under the Act.

b. Relationship between CWA and UTC

I find, based on the record as a whole, that here is no collective-bargaining relationship between CWA and UTC. CWA does not represent UTC drivers *vis-à-vis* UTC in matters such as collective bargaining, or grievance processing. Rather, CWA receives "dues" from the 262 UTC drivers for interests CWA has outside its employee representative capacity. *Sierra Vista Hospital, supra.*

The evidence establishes that like IAM in *Alanis, supra*, CWA was involved with UTC from its inception. Specifically, CWA assisted UTC's predecessor, ProTAXI, in successful lobbying efforts at the Colorado General Assembly for a change in the law. That change in the law allowed the ProTAXI CWA members to form UTC, enabling UTC to gain entry into the passenger transportation industry. Since its inception, UTC has also leased office and parking lot space from CWA, and has been identified with the Union on its website.

According to the Union's Local President, the assistance CWA currently provides to UTC includes legal advice and legal representation; continued lobbying at the State Legislature; representation with certifying and licensing entities including DIA, CPUC, and traffic enforcement agencies; and assistance in competitive disputes involving commercial enterprises served by both UTC and SuperShuttle Denver, such as the dispute at the downtown Hyatt.

These facts establish that the relationship between the Union and UTC is significantly different than the circumstances relied upon by the Union in its post-hearing brief involving situations where a union receives dues from members it represents in multiple bargaining units for employers competing in the same industry. In situations where a union represents several different bargaining units of competitors' employees,

the dues received are primarily for representational activities involving the bargaining unit members' relationships with their employer, not primarily for legal and lobbying matters with governmental entities, in a situation where no collective-bargaining relationship even exists.

I note also, that this is not a situation like that present in *Western Great Lakes Pilots Association,* where the union merely supported a proposal being considered by the regulatory body, which, if enacted, could have resulted in elimination of the employer. Herein, CWA lobbied for a change at the Colorado General Assembly on behalf of its affiliate ProTAXI, which resulted in the former ProTAXI members forming UTC. But the relationship did not end there, rather, CWA has continued to assist UTC in matters wholly unrelated to collective bargaining, and has a significant financial interest in the success of UTC as discussed immediately below.

c. Disabling financial conflict

The factor I find most critical in the analysis of a disabling conflict, which was not present in *Alanis*, is the financial interest CWA has in the success of UTC by virtue of the per capita monthly fee it pays to the Union. These monthly fees amount to more than $88,000 a year and they are received outside of any representative capacity. There is no dispute that these monies are not used by CWA to defray the costs of traditional collective-bargaining, such as bargaining a contract with UTC, or processing grievances pursuant to a contract. Rather, these monies go into the Union's general fund as payment for services to UTC that are unrelated to any obligation under the Act to represent the UTC drivers in their relationship with UTC. In return for this monthly per capita fee, the evidence establishes that the Union continues to provide UTC with

the same kinds of assistance the Union had previously provided to ProTAXI by virtue of the Affiliation Agreement.

Here, the Union, in essence, is the competitor because of the kinds of managerial assistance it provides to UTC for financial remuneration in the form of the per capita "dues." Thus, while the Union does not have a direct financial ownership stake in UTC, it still gains financially when UTC prospers, which is precisely the kind of conflict the Board warned of in *Bausch & Lomb* and *St John's Hospital and Health Center*. Namely, the danger that CWA's bargaining efforts on behalf of the SuperShuttle Denver employees would be influenced by its financial interests outside its representative capacity because of its relationship with UTC.

In this regard, I conclude that everything the Union does to assist UTC in return for the monthly fees it receives could have a significant impact on the Union's representational capacity for the SuperShuttle Denver employees. The nature of the industry in which UTC and SuperShuttle Denver compete is such that intervention on behalf on one entity can result in a loss of business for another entity. This could take the form of one company gaining vehicle certificates, while the other entity loses them because CPUC issues a finite number of certificates. This is particularly troubling since UTC has a 3 to 1 advantage in that its cooperative members hold 262 certificates, and SuperShuttle Denver has 86. Intervention by the Union on behalf of UTC could also take the form of one entity gaining a time advantage for curbside waiting at DIA, or for locations to park and wait for passengers in the downtown area, which is precisely the kind of intervention UTC was seeking from the Union in its dispute at the Hyatt.

Accordingly, I find that the form of assistance provided by the Union to UTC in exchange for monthly financial remuneration is in direct conflict with the single-minded

representational purpose required of a bargaining representative, since the Union's advocacy on behalf of UTC could have direct, adverse effects on the SuperShuttle Denver bargaining unit.

ORDER

IT IS HEREBY ORDERED that the petition filed in this case is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **– March 12, 2010, at 5 p.m. Eastern Time,** unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be

considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[15]

A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions.

The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

DATED at Denver, Colorado this 26th day of February, 2010.

[15] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Michael W. Josserand, Regional Director
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